

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 vs.

12 LEONEL MICHEL VARGAS,

13 Defendant

Case No.: CR-13-6025-EFS

**Motion and Memorandum To Suppress
Evidence from Continuous Video
Surveillance Pole Cam**

**October 8, 2013 @ 1:45 p.m.
With Oral Argument**

14
15 **MOTION**

16 Defendant LEONEL MICHEL VARGAS moves the Court to suppress all evidence
17 obtained by the police from the surreptitious, long term, continuous live and recorded
18 video surveillance of the defendant's home with a pole camera capable of remote pan
19 and zoom installed without a warrant.
20

21 This Motion is based upon the Fourth Amendment to the United States
22 Constitution and the authorities set forth in the Memorandum of Authorities herewith
23 filed.
24
25
26
27

28 **MEMORANDUM IN SUPPORT OF
MOTION TO SUPPRESS- 1**

**JOHN S. MATHESON, ESQ.
315 W. KENNEWICK AVE.
KENNEWICK, WA 99336
(509)586-3091**

MEMORANDUM

SUMMARY OF ARGUMENT

It is respectfully submitted that a warrant is required for police to conduct a criminal investigation by secretly installing a pole camera with remote pan and zoom capability to acquire continuous, long term video surveillance of the area near the defendant's home. No warrant was requested, no exception applies, and all evidence derived from the video surveillance should be suppressed.

SUMMARY OF FACTS

A gang task force secretly installed the video pole camera without requesting a warrant. They suspected the defendant was a participant in a drug trafficking organization. No information is provided to establish probable cause to believe that any criminal acts had taken place at the home. The police used the video device to secretly and continuously monitor and record all activities at the defendant's home. The defendant's home is located in a remote agricultural area north of the Snake River approximately 10.5 miles from the Franklin County Courthouse. Attached is a printout from Google Maps and a photograph printed from the Franklin County website which depict the remote home site. The video surveillance was a "fishing expedition" to further the criminal drug investigation by continuously spying on the defendant, his home, his family and all visitors based upon unspecified hearsay information.

The camera was installed on April 4, 2013. On May 2, 2013, after nearly a month of surveillance, the defendant was observed (recorded) walking from his backyard to the frontyard to target shoot a pistol. A copy of the police report at Bates page No.

00000029, is attached. The target shooting activity confirms the remoteness and expectation of privacy. Later video surveillance revealed other firearms and target practice sessions. Further investigation showed that the firearms were shipped in interstate commerce and that the defendant was an undocumented alien. Agents subsequently obtained search warrants and seized firearms and contraband including drugs from the defendant's home and vehicles.

ARGUMENT

The techniques and practices of video surveillance have developed to the degree that the practice of secret, prolonged, continuous police video surveillance of the area near a home, like a surreptitious wiretap or gps monitoring of an automobile, is a search subject to the warrant requirement of the Fourth Amendment because such surveillance intrudes upon the defendant's reasonable expectation of privacy. Clearly, continuous, long term secret video surveillance of the home reveals information about daily activities and patterns of everyone living at the home or visiting that, as a practical matter, would remain private without the aid of the technology. US v. Nerber, 222 F.3d 597 (9th Cir. 2000) citing US v. Taketa, 923 F.2d 665 (9th Cir. 1991) and US v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987).

The Defendant asserts this pole camera surveillance was a search subject to Fourth Amendment protection which required a warrant. US v. Koyomejian, 970 F.2d 536 (9th Cir. 1992); US v. Nerber, 222 F.3d 597 (9th Cir. 2000). No exception to a warrant applies and the evidence seized without a warrant should be suppressed as

1 fruit of the poisonous surveillance. US v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991);
2 Nerber, supra at 605.

3 To establish Fourth Amendment Protection, an individual must show he has a
4 reasonable expectation that his activities would be private, and that his expectation is
5 one that society is prepared to recognize as reasonable. United States v. Bautista, 362
6 F.3d 584 (9th Cir 2004); Nerber, supra.

7
8 Nerber, at 222 F.3d p. 606, note 9, states:

9
10 This circuit has joined numerous others in holding that the Fourth
11 Amendment imposes similar warrant requirements on the government's
12 use of video surveillance as the wiretap statute imposes upon the use of
13 audio surveillance. See Koyomejian, 970 F.2d at 542.

14 Video surveillance is subject to higher scrutiny under the Fourth Amendment.
15 Taketa, 923 F.2d at 675. The Ninth Circuit has held that the Fourth Amendment forbids
16 warrantless videotaping of a private office, id. at 678, and hotel rooms, Nerber, supra at
17 604. Video surveillance of the home and curtilage has been subjected to Fourth
18 Amendment analysis. US v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987).
19 "Cuevas's expectation to be free from this type of video surveillance in his backyard is
20 one that society is willing to recognize as reasonable." Id. at 251. See also US v.
21 Maynard, 615 F. 3d 544 (D.C. Cir. 2010), re-hearing denied, sub nom. US v. Jones, 625
22 F. 3d 766 (D.C. Cir. 2010).

23 The court in Nerber, supra, reviewed several Fourth Amendment video
24 surveillance cases and concluded that the nature of the intrusion by the government can
25 effect a citizen's legitimate expectation of privacy. That court recognized a "temporary
26
27

1 zone of privacy” may be protected from video surveillance even in a place not owned or
 2 ordinarily controlled. That court states At 222 F.3d 602-604:

3
 4 This principle has been applied in several Court of Appeals
 5 decisions as well. In United States v. Taketa, 923 F.2d 665 (9th Cir. 1991),
 6 government agents, who suspected DEA agent O’Brien of wrongdoing,
 7 physically searched his office and installed a hidden surveillance camera.
 8 The camera caught O’Brien and a co-worker, Taketa, conducting an illegal
 9 wiretapping operation. We ruled that although Taketa did not have
 “standing” to challenge the physical search of O’Brien’s office, he could
 invoke the Fourth Amendment to suppress the video surveillance of
 himself:

10 Here, Taketa has no general privacy interest in
 11 O’Brien’s office, but he may have an expectation of privacy
 12 against being videotaped in it Persons may create
 13 temporary zones of privacy within which they may not be
 14 videotaped . . . even when that zone is a place they do not
 15 own or normally control, and in which they might not be able
 16 reasonably to challenge a search at some other time or by
 some other means.

17 Id. at 676-77.

18 In United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987),
 19 the court ruled that the installation of a surveillance camera on a power
 20 pole to videotape activities in a suspect’s backyard constitutes a “search”
 within the meaning of the Fourth Amendment. The Fifth Circuit, like the
 Supreme Court in *Bond*, distinguished cases involving surveillance of
 property from the air:

21 To measure the government’s intrusion we must
 22 consider the expectations of society. *Ciraolo* teaches us that
 23 a fly-over by a plane at 1,000 feet does not intrude upon the
 24 daily existence of most people; we must now determine
 25 whether a camera monitoring all of a person’s backyard
 26 activities does. This type of surveillance provokes an
 27 immediate negative visceral reaction: indiscriminate video
 surveillance raises the spectre of the Orwellian state. Here,
 unlike in *Ciraolo*, the government’s intrusion is not minimal.
 It is not a one-time overhead flight or a glance over the fence

1 by a passer-by. Here the government placed a video
 2 camera that allowed them to record all activity in Cuevas's
 3 backyard. It does not follow that Ciraolo authorizes any type
 4 of surveillance whatever just because one type of minimally
 5 intrusive aerial observation is possible Cuevas's
 6 expectation to be free from this type of video surveillance in
 7 his backyard is one that society is willing to recognize as
 8 reasonable.

9
 10 Cuevas, 821 F.2d at 251. While Cuevas had no legitimate
 11 expectation to be free from occasional "snooping" into his backyard from a
 12 passing airplane, he did have a legitimate expectation to be free from
 13 constant video surveillance.

14

15
 16 The unmistakable message of these cases is that the legitimacy of
 17 a person's expectation of privacy may depend on the nature of the
 18 intrusion. In assessing defendants' expectation of privacy under the facts
 19 of this case, we must consider the severity of the intrusion to which they
 20 were subjected.

21

22
 23 The objective reasonableness of defendants' privacy expectation
 24 presents a closer question. The governmental intrusion was severe.
 25 Hidden video surveillance is one of the most intrusive investigative
 26 mechanisms available to law enforcement. The sweeping, indiscriminate
 27 manner in which video surveillance can intrude upon us, regardless of
 28 where we are, dictates that its use be approved only in limited
 circumstances. As we pointed out in *Taketa*, the defendant had a
 reasonable expectation to be free from hidden video surveillance because
 "the video search was directed straight at him, rather than being a search
 of property he did not own or control [and] the silent, unblinking lens
 of the camera was intrusive in a way that no temporary search of the office
 could have been." *Id.* at 677. As Judge Kozinski has stated, "every court
 considering the issue has noted [that] video surveillance can result in
 extraordinarily serious intrusions into personal privacy If such
 intrusions are ever permissible, they must be justified by an extraordinary
 showing of need." *United States v. Koyomejian*, 970 F.2d 536, 551 (9th
 Cir. 1992) (Kozinski, J., concurring). And, as the Fifth Circuit said, hidden
 video surveillance invokes images of the "Orwellian state" and is regarded
 by society as more egregious than other kinds of intrusions. Cuevas, 821

1 F.2d at 251. See also *United States v. Mesa-Rincon*, 911 F.2d 1433, 1442
 2 (10th Cir. 1990) ("Because of the invasive nature of video surveillance, the
 3 government's showing of necessity must be very high to justify its use");
 4 *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984) ("We think it . . .
 5 unarguable that television surveillance is exceedingly intrusive, especially
 6 in combination (as here) with audio surveillance, and inherently
 7 indiscriminate, and that it could be grossly abused--to eliminate personal
 8 privacy as understood in modern Western nations").

9 In *U.S. v. Anderson-Bagshaw*, No. 12-3074, 6th Cir., Dec. 19, 2012(Cert. Den.
 10 April 22, 2013), the majority held it was not necessary to decide in that case whether
 11 long-term video surveillance of curtilage requires a warrant, but in dicta states:

12 Nonetheless, we confess some misgivings about a rule that would
 13 allow the government to conduct long-term video surveillance of a
 14 person's backyard without a warrant. Few people, it seems, would expect
 15 that the government can constantly film their backyard for over three
 16 weeks using a secret camera that can pan and zoom and stream a live
 17 image to government agents. We are inclined to agree with the Fifth
 18 Circuit that "[t]his type of surveillance provokes an immediate negative
 19 visceral reaction." *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251
 20 (5th Cir. 1987) (stating in dicta that using a pole camera to view curtilage
 21 over a 10-foot fence constitutes a Fourth Amendment search). We also
 22 note that *Ciraolo* involved a brief flyover, not an extended period of
 23 constant and covert surveillance.

24 The concurring opinion of Justice Karen Nelson Moore in *Anderson-Bradshaw*,
 25 *supra* would reach and hold that the Fourth Amendment protects against secret
 26 continuous video monitoring of residential property, and concludes at page 50-51 as
 27 follows:

28 In *United States v. Oliver*, 686 F.2d 356 (6th Cir. 1982) (en banc),
 aff'd, 466 U.S. 170 (1984), even as we robustly affirmed the open-fields
 doctrine, we maintained that the Fourth Amendment "would protect a
 person in an open field." 686 F.2d at 360. This makes sense, because
 the Fourth Amendment "protects people, not places." *Katz*, 389 U.S. at
 351. We explained that the Fourth Amendment principles articulated by
 courts protects privacy by "establish[ing] an environment in which

1 individual emotional and mental processes can develop freely without
2 surveillance or interference.” Oliver, 686 F.2d at 360 (emphasis added).
3 This important freedom is threatened by the severely intrusive tactics used
4 to monitor continuously Bagshaw’s activities on her residential property-
5 warrantless, long-term secret video surveillance. Bagshaw’s expectation
6 that she would not be monitored continuously on her own property is
7 reasonable. In sum, I would hold that the video surveillance obtained
8 using the pole camera in this case was an unreasonable search which
9 violated Bagshaw’s Fourth Amendment rights.

10 CONCLUSION

11 The use of the pole camera here was an unreasonable search which
12 violated the defendant’s Fourth Amendment rights. Mr. Vargas has a reasonable
13 expectation to be free from secret, long-term, continuous video surveillance of his
14 home by police for a criminal investigation. The expectation is one society is
15 willing to recognize as reasonable. The remote character of the defendant’s
16 home is such that his expectation of privacy in his front yard is equally as
17 reasonable as the back. This is especially true in the context of intense, secret,
18 long term, continuous video surveillance of the home including the front door.

19 The intrusive nature of secret, continuous, long-term video surveillance of
20 the home, its residents and guests is spying by the police subject to Fourth
21 Amendment protection. This was a fishing expedition conducted in violation of
22 defendants reasonable expectation of privacy and without judicial sanction. A
23 warrant was required. There is no applicable exception to the warrant. All
24 evidence derived from the surveillance must be suppressed as fruit of the
25 poisonous surveillance, including all firearms and drugs.

1 Respectfully submitted this 19th day of September, 2013.

2
3 s/John S. Matheson
4 JOHN S. MATHESON, WSBA No. 8288
5 Attorney for Defendant
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/EDF System which will send notification of such filing to the following: Alex Ekstrom, Assistant United States Attorney

s/John S. Matheson
John S. Matheson, WSBA No. 8288
Attorney for Defendant